Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SUMARDI SUNARTO – PETITIONER,

VS.

U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT - RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner's Petition for Panel Rehearing should have been granted by the US Court of Appeals for the Sixth Circuit because Petitioner filed his motion to reopen/reconsider to the Board of Immigration Appeals ("BIA") without legal representation, which violates his constitutional rights to due process; and therefore, the time period for seeking appellate review should have been tolled?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Petitioner, in compliance with Rule 14(b) and rule 29.6 of the Rules of the Supreme Court of the United States, certifies the following listed person and parties have an interest in the outcome of this case:

1. US Court of Appeals for the Sixth Circuit, Respondent
2. Eric H. Holder, Jr., U.S. Attorney General, Respondent
3. Peter D. Keisler, Attorney for Respondent
4. Linda S. Wernery, Attorney for Respondent
5. Leslie McKay, Attorney for Respondent
6. The Board of Immigration Appeals
7. Charles E. Pazar, Immigration Judge
8. Cindy S. Chang, Attorney for Petitioner
9. Sumardi Sunarto, Petitioner

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1. The US Court of Appeals for the Sixth Circuit erred in denying Petitioner's Petition for Panel Rehearing because in doing so,Petitioner's constitutional right to representation was violated due to the fact that Petitioner did not have legal representative during his removal proceedings and his appeal to the Board of Immigration Appeals.

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STATEMENT OF JURISDICTION

On February 26, 2009, the US Court of Appeals for the Sixth Circuit denied the Petitioner's petition for panel rehearing. This Court's jurisdiction to grant the review on a writ of certiorari is discretional. The judicial discretion is warranted here because there is a legal question of exceptional importance involved in this case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1. 8 U.S.C. Sections 1127(a)(1)(B)
2. Immigration & Nationality Act Section 237 (a)(l)(B)
3. 8 U.S.C. Sections 1229a (b)
4. 8 C.F.R. Section 240.3

STATEMENT OF THE CASE

This is an immigration case. Petitioner is a native and citizen of Indonesia. Petitioner petitions for a writ of certiorari on the decision rendered by the US Court of Appeals for the Sixth Circuit on February 26, 2009.

The Petitioner, Sumardi Sunarto, is a native and citizen of Indonesia with Chinese ethnicity and Buddhist faith. Petitioner Applied for relief from removal to Indonesia in the form of asylum, withholding of removal under Immigration and Nationality Act and under the

Convention Against Torture.

Petitioner was admitted to the United States on July 11, 2000 as a nonimmigrant visitor with authorization to remain until January 1,
2001.

On July 9,2001, petitioner, without any legal representation, filed an affirmative application for asylum with the Department of Homeland Security. After an interview with an asylum officer, petitioner's case was referred to the immigration court with a Notice to Appear charging him with removability under Section 237(a)(I)(B) of the Immigration and Nationality Act ("INA"), and 8 U.S.C. Section 1127(a)(I)(B), for overstaying his visa.

On February 18, 2003, petitioner submitted a statement in support of his asylum application to immigration judge ("IJ") in Denver, CO, in which he conceded his removability. On March 13, 2003, IJ issued an order denying petitioner's application for asylum and withholding of removal. Petitioner appealed to BIA on March 24, 2003 by himself.

On November 10, 2004, BIA issued a decision and remanded the matter to IJ for further action due to the fact the recordings from the proceedings were missing.

Thereafter, Petitioner, again, Pro se, filed a request for change of venue and this case had a changed of venue to Memphis, TN.

On June 8, 2006, IJ in Memphis, TN. denied the Petitioner's applications for asylum and withholding of removal.

On June 16, 2006, Petitioner, Pro se, filed an appeal to the BIA. BIA dismissed his appeal on October 30, 2007. Petitioner then filed a Motion to Reopen/Reconsider, again, by himself, on November 27, 2007, which was rejected by BIA for failure to submit the correct fee.
On December 4, 2007, Petitioner resubmitted the motion, for his own behalf to BIA with the correct fee.

On February 20, 2008, BIA denied Petitioner's Motion to Reopen/reconsideration.

On March 19, 2008, through the undersigned counsel, Petitioner filed a timely Petition for Review to the US Court of Appeals for the Sixth Circuit Court.

The Sixth Circuit Court denied that petition on January 15, 2009. Petitioner then filed a petition for panel rehearing. Unfortunately, that petition was denied on February 26, 2009.

ARGUMENT

Individuals subject to removal proceedings have certain constitutional and statutory rights. In Accardi v. Shaughnessy, 347 U.S. 260 (1954) the Court held that due process protections under the Fifth Amendment extend to Non-citizens who entered the United States, whether lawfully or unlawfully.

Person in removal (formerly deportation) proceeding is entitled to full due process. "It is well established that the Fifth Amendment

entitles aliens to due process of law in deportation proceedings." See Reno v. Flores, 507 U.S. 292, 306 (1993).

Non-citizens do not have a Six Amendment right to be represented in removal proceedings. Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988). However, the right to counsel in removal proceedings is grounded in the Fifth Amendment's guarantee of due process. Prichard-Ciriza v. INS, 978 F.2d 219,222 (5th Cir. 1992); 8 U.S.C. Section 1229a(b); 8 C.F.R. Section 240.3. In the asylum context, the right to counsel has been characterized as "Fundamental". Orantes-Hernadez v. Thornburgh, 919 F.2d 549,554 (9th Cir. 1990).

In this case, Petitioner had no legal representation throughout his removal proceedings. Petitioner appeared for himself in court. Petitioner then filed his Motion to Reopen/Reconsider to BIA, Pro se, was even rejected at first for not submitting the correct fee. Clearly, Petitioner's due process right to representation was violated.

Under the circumstances, it is fundamentally unfair to deny Petitioner's petition for panel rehearing because the Sixth Circuit Court should have reviewed Petitioner's petition for review.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

Dated: May 22, 2009

Respectfully Submitted

By: /S/

Cindy S. Chang, Esq.
Attorney for Petitioner,
Sumardi Sunarto

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Case: 08-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

SUMARDI SUNARTO,
Petitioner

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent

BEFORE: MERRITT, Circuit Judge; COLE, Circuit Judge; SUTTON, Circuit Judge;

Upon consideration of the petition for rehearing filed by the petitioner,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY
ORDER OF THE
COURT
Leonard Green,
Clerk

Issued: February 26, 2009

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 08-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRUIT

FILED
Jan 15 2009
LEONARD GREEN, CLERK

SUMARDI SUNARTO,
Petitioner,

v.

ON PETITION FOR REVIEW FROM AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

MICHAEL B. MUKASEY,
Attorney General, Respondent.

BEFORE: MERRITT, COLE, and SUTTON, Circuit Judges.

COLE, Circuit Judge. Petitioner Sumardi Sunarto seeks review of the Board of Immigration Appeal's denial of his motion to reopen his removal proceedings and reconsider his application for asylum, withholding of removal, and protection under the Convention Against Torture. For the reasons set forth below, we DENY Sunarto's petition for review.

I. BACKGROUND

Sumardi Sunarto is a native and citizen of Indonesia who is seeking asylum in this country. He lawfully entered the United States on July 11, 2000 with a non-immigrant visa, which authorized him to

remain in this Country until January 1, 2001. On July 9, 2001, Sunarto filed an application with the Immigration and Naturalization Service ("INS"), now part of the Department of Homeland Security, for asylum and withholding of removal, under §§ 208 and 241 (b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), respectively, and protection under the Convention Against Torture ("CAT"), 8 C.F.R. § 1208,16(c)(2). In a subsequently filed statement in support of the application, Sunarto claimed that he had suffered past persecution and that he has a well-founded fear of future persecution in Indonesia based on: (1) his Chinese ethnicity, (2) his Buddhist religious beliefs, and (3) his fear of ethnic and religious violence in Indonesia.

On June 8, 2006, the Immigration Judge ("IJ") denied Sunarto's application for asylum, withholding of removal and protection under the CAT and ordered him removed to Indonesia. Sunarto then timely appealed the IJ's decision to the BIA, arguing that he had suffered past persecution in Indonesia, and that he has a well-founded fear of future persecution in that country, on account of his ethnicity and religion. On October 30, 2007, the BIA affirmed the IJ's decision and dismissed Sunarto's appeal. Sunarto did not appeal or seek review of his petition in federal court.

On December 4, 2007, however, Sunarto filed with the BIA a "Motion to Reopen and Reconsider." On February 20, 2008, the BIA dismissed Sunarto's motion, concluding that it did not satisfy the requirements for reopening removal proceedings under 8 C.F .R. § 1003 .2(c). Specifically, the BIA declined to reopen the proceedings because Sunarto failed to submit (i) an application for asylum with his motion, and (ii) new or previously unavailable or

undiscoverable documentary evidence. The BIA also declined to reconsider its earlier decision affirming the IJ's denial of relief because all issues raised in the motion had been addressed by the BIA in its October 30, 2007 decision. In short, the BIA concluded that Sunarto's motion presented facts and legal arguments identical to those already considered and rejected in its earlier decision. Sunarto now petitions this Court to review the BIA's decision.

II. JURISDICTION

Sunarto's petition indicates that he is appealing the BIA's February 20, 2008 denial of his motion. The substance of Sunarto's brief, however, is largely devoted to challenging the BIA's October 30, 2007 decision affirming The IJ's denial of relief. Given the frequency and the severity of past incidents of persecution and the unsafe conditions in Indonesia for non-Muslims, Sunarto contends that the BIA erred when it affirmed the IJ's denial of his application for asylum. The respondent concedes that Sunarto timely appealed the BIA's February 20, 2008 decision inasmuch as he filed his March 30, 2008 petition for review within the thirty-day filing period. See 8 U.S.C. § 1252(b)(1). To the extent that Sunarto seeks appellate review of the BIA's October 30, 2007 decision, however, the respondent contends that his petition is untimely and not eligible for review by this Court.

The respondent has the better argument. We lack appellate jurisdiction to review the BIA's October 30, 2007 decision affirming the denial of asylum, withholding of removal, and protection under the CAT. This Court has appellate jurisdiction to review only final orders of removal that have been

timely appealed. 8 V.S.C. § 1252(a)(1). Petitions requesting appellate review of a BIA decision "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1). The statutory time limit is "both mandatory and jurisdictional." Prekaj v. INS, 384 F.3d 265, 267 (6th Cir. 2004) (quoting Martinez-Serrano v.INS, 94 F.3d 1256, 1258 (9th Cir. 1996)).

Sunarto failed to seek review of the BIA's October 30, 2007 decision within thirty days of the issuance of that decision. Moreover, Sunarto's filing of a motion did not toll the time period for seeking appellate review of that decision. See, e.g., Stone v. INS, 514 U.S. 386, 389-90 (1995) (holding that the timely filing of a motion to reopen or reconsider with the BIA does not toll the time period for seeking appellate court review and that the mere act of filing the motion does not render non-final the underlying BIA decision). Accordingly, to the extent that Sunarto challenges the IJ's underlying order denying his application for asylum, withholding of removal, and protection under the CAT, we lack jurisdiction to consider these claims because Sunarto failed to file a timely petition for review of the order. See Prekaj, 384 F.3d at 268. Thus, we have jurisdiction to consider only the BIA's February 20, 2008 decision declining to reopen proceedings or reconsider the case.

III. DISCUSSION

A. Standard of Review

We review legal determinations made by the BIA de novo. Harchenko v. INS, 379 F.3d 405, 409 (6th Cir. 2004). We review a denial of a motion to

reopen proceedings and reconsider an application for asylum, withholding of removal, and protection under the CAT for an abuse of discretion, INS v. Doherty, 502 U.S. 314, 323 (1992); Alizoti v. Gonzales, 477 F.3d 448, 451 (6th Cir, 2007). An abuse of discretion occurs when" the denial of the motion to reopen [and] reconsider was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." Allabani v. Gonzales, 402 F.3d 668, 675 (6th Cir. 2005). In determining whether the BIA abused its discretion, we may look at "the basis articulated in the decision and [we] may not assume that the [BIA] considered factors that it failed to mention in its opinion." Daneshvar v. Ascroft, 355 F.3d 615,626 (6th Cir. 2004).

B. Motion to Reconsider

The BIA did not abuse its discretion when it denied Sunarto's motion to reconsider its October 30, 2007 decision affirming the IJ's denial of relief. Sunarto's underlying application is based on harassment of ethnic Chinese and non-Muslims in Indonesia during incidents of unrest, which he witnessed in 1983, May 1998, and in 1999, and general discrimination against non-Muslims and ethnic Chinese in that country. In affirming the IJ's denial of relief, the BIA concluded that the incidents of past mistreatment described by Sunarto were, in fact, merely incidents of harassment, discrimination, and damage to his car, that did not amount to actionable persecution under the INA. The BIA explained that Sunarto had not been physically injured during any of the incidents on which he

relies, and that as a result there is no evidence of persecution. In the subsequent motion, supported solely by his own affidavit, Sunarto argued that the evidence before the BIA warranted relief. In denying that motion, the BIA explained that the contentions raised in Sumatra's motion were considered and addressed in its previous decision. On appeal, Sunarto presents that identical argument again-that the evidence previously submitted warrants relief. In particular, he argues that during his removal proceedings, he testified that the cruelty he suffered due to his Chinese ethnicity and his Buddhist faith in Indonesia constituted persecution. Sunarto further contends that the Country Reports and evidence presented by him indicate that he has a well-founded fear that he will suffer future persecution if returned to Indonesia.

"The purpose of a motion to reconsider is the correction of legal or factual errors that occurred in the BIA's original decision." Mu Ju Li v. Mukasey, 515 F.3d 575, 578 (6th Cir. 2008) (citing 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2 (b)(1)). Ultimately, the motion "is a request to the BIA to reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." Ahmed v. Aschroft, 388 F.3d 247,249 (7th Cir. 2004) (quoting In re Cerna, 20 I. & N. Dec. 399, 402 n. 2 (B.1.A. 1991)). As such, BIA regulations require a motion to reconsider to "state the reasons for the motion by specifying the errors of fact or law in the prior [BIA] decision and shall be supported by pertinent authority." 8 C.F.R. § 1003.2 (b)(1). After examining the record, it cannot be said that the BIA irrationally concluded that Sunarto presented no additional legal arguments or facts in his motion that had not already been presented to

and rejected by it in its earlier decision affirming the IJ's denial of asylum, withholding of removal, and protection under the CAT. See § 1003.2(b)(1).

An examination of the record confirms that the evidence upon which Sunarto relies in his motion, including the incidents described in his affidavit, reiterate instances of harassment and discrimination that Sunarto described during his hearing before the IJ. In particular, the affidavit merely recounts Sunarto's claims that he witnessed harassment of ethnic Chinese and non-Muslims during unrest in Indonesia in 1983, May 1998, and in 1999. In his motion, Sunarto never claims that he was physically injured during these incidents. See Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998) (holding that "harassment or discrimination does not rise to the level of persecution" under the INA unless it is accompanied by "physical punishment, infliction of harm, or significant deprivation of liberty"). Nor does he claim that his family members were injured. See Akhtar v. Gonzales, 406 F.3d 399, 406 (6th Cir. 2005) (noting acts of violence against an asylum applicant's family members may demonstrate that s/he has a well-founded fear of persecution if such acts are linked to persecution against the applicant). Moreover, Sunarto's affidavit does not provide any new or additional incidents of persecution that Sunarto claims to have suffered. Mikhailevitch, 146 F.3d at 390. And, finally, Sunarto fails to refute the Country Reports or to offer evidence establishing that he has an individualized fear of future persecution in Indonesia. See Lolong v. Gonzales, 484 F.3d 1173,1180-81 (9th Cir. 2007) (holding that petitioner, an ethnic Chinese Christian from Indonesia, did not establish a well-founded fear of future persecution in Indonesia because she failed to

demonstrate that she would be individually targeted for persecution, and Country Reports indicate that religious discrimination and harassment of ethnic Chinese have declined in previous years). Put simply, the motion lacks any indication of "errors of fact or law in the prior" decision that would warrant the BIA's reconsideration. We therefore cannot conclude that Sunarto's failure to raise factual or legal errors in the BIA's October 30, 2007 decision was an irrational explanation for the BIA's conclusion that Sunarto had failed to specify any new facts or arguments in his motion that warrant reconsideration.

Motions for reconsideration require more than the simple rehashing of previously rejected arguments and facts. Ahmed, 388 F.3d at 249; Sswajje, 350 FJd at 533. Because Sunarto failed to identify any errors of fact or law in the BIA's earlier decision, he has failed to meet the requirements for reconsideration. See Sinistaj v. Ashcroft, 376 F.3d 516, 519 (6th Cir. 2004) (motion for reconsideration is properly denied where petitioner fails to meet the requirements for reconsideration). We therefore conclude that the Board did not abuse its discretion in denying Sunarto's motion. Accordingly, we DENY Sunarto's petition for review on this basis.

c. Motion to Reopen

It is not entirely clear that Sunarto challenges the BIA's decision denying the motion to reopen his asylum and removal proceedings. The respondent's brief, however, appears to assume that Sunarto seeks review of both the BIN s decision to deny reconsideration and the reopening of proceedings. Under the general rule, "[a petitioner] waives an

issue when he fails to present it in his initial briefs before this court." Marks v. Newcourt Credit Group, Inc., 342 F.3d444, 462 (6th Cir.2003). However, we have recognized an exception "that where an argument advanced in [a petitioner's] opening brief applies to and essentially subsumes an alternative basis for affirmance not separately argued therein; the [petitioner] does not waive that alternative basis for affirmance." United States v. Goforth, 465 F.3d 730, 737 (6th Cir. 2006) (citing Stambaugh v. Corrpro Co., No. 03-3904,2004 WL 2625036, at *5 (6th Cir. Nov. 17,2004)). Because the analysis of Sunarto's claims is largely the same under both reconsideration and reopening, we believe that Sunarto's arguments with respect to the reopening claims are sufficiently subsumed by his arguments on the reconsideration claims and that this exception applies. Accordingly, we conclude that Sunarto did not waive his argument as to the reopening claims.

We are of the view that the BIA did not abuse its discretion in finding that Sunarto did not meet the requirements to reopen proceedings for the same reasons we conclude that it did not abuse its discretion by denying Sunarto's motion for reconsideration. Pursuant to 8 C.F.R. § 1003.2(c)(1), a motion to reopen proceedings under must "state the new facts that will be proven at a hearing to be held if the motion is granted." According to that regulation, the motion must be supported by affidavits or other evidentiary material. 8 C.F.R. §1003.2(c)(1). A motion to reopen is properly denied where the motion does not introduce previously unavailable material evidence. INS v. Abudu, 485 V.S. 94,97-98 (1988).

Here, Sunarto did not meet the regulation's requirements. First, he failed to provide

any new material evidence in support of his motion. As we have already noted, Sunarto submitted his own affidavit in support of the motion, which detailed previously described incidents of harassment and discrimination. Second, even assuming that Sunarto's affidavit offers new incidents of past persecution or provides new details relating to the severity of such persecution, this evidence would have been previously available to Sunarto inasmuch as his claim rests almost entirely on his own memory. To the extent Sunarto relies on new evidence, he fails to offer an explanation as to why any of this evidence was previously unavailable.

On the record, it is clear that the BIA's denial of Sunarto's motion was based on a rational explanation, and there is no evidence that it departed from established policies. See Allabani, 402 F.3d at 675. According to the applicable regulation, if the motion to reopen proceedings is for the purpose of submitting an application for relief, the appropriate application for relief and all supporting documentation must be submitted. 8 C.F.R. § 1003.2(c)(I). Sunarto did not attach an application for asylum to his motion to reopen proceedings and his motion to reopen sought asylum, withholding of removal, or protection under the CAT. Accordingly, the BIA did not abuse its discretions in denying Sunarto's petition.

IV. CONCLUSION

Because the BIA's denial of Sunarto's Motion to Reopen or Reconsider was not an abuse of discretion, we DENY Sunarto's petition for review.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of immigration Appeals

Falls Church Virginia 22041

File: A 79 483 629 - Memphis, TN

Date: FEB 2 0 2008

In re: SUMARDI SUNARTO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Harris Lee Leatherwood
Assistant Chief Counsel

APPLICATION: Reopen; reconsider

ORDER:

PER CURIAM. This case was last before this Board on October 30, 2007, when we affirmed the Immigration Judge's decision denying the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture. On December 4, 2007, 'the respondent filed a timely motion to reopen. The Department of Homeland Security filed an opposition to the respondent's motion.

In motions to reopen proceedings the respondent bears a "heavy burden" in showing such action is warranted. Matter of Coelho, 20 I&N Dec. 464 (B1A 1997). The current motion is supported solely by a personal affidavit of the respondent. We find the respondent's motion must be denied for failure to submit an application for asylum and for failing to submit documentary evidence that constitutes new or previously unavailable or undiscoverable evidence. See 8 C.F.R. § 1003.2(c). Accordingly, we find the motion to reopen and remand docs not satisfy the requirements for reopening. Sec 8 C.F.R. 1003.2(c).

To the extent that the respondent intends the motion to be a motion to reconsider, we find that the motion must be denied. A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. The contentions in the motion were addressed in our previous decision. See Matter of O-S-G-, 24 I&N Dec. 56 (BIA 2006). Accordingly, the motion to reconsider is denied.

FOR THE BOARD

[1] The respondent initially filed his motion on November 27, 2007, which was rejected for failure to submit the correct fee. On December 4, 2007, the respondent resubmitted the motion with the correct fee.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A 79 483 629 - Memphis, TN

Date: OCT 30 2007

In re: SUMARDI SUNARTO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 237(a)(I)(B), I&N Act
[8 U.S.C. §1227(a)(1)(B)]-
In the United States in violation of law

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture

This matter was last before the Board on November 10, 2004, when we determined that the respondent's testimony and the Immigration Judge's

APPENDIX D

oral decision rendered on March 13, 2003, were missing from the record and consequently remanded the matter to the Immigration Judge for further action. On June 8, 2006, the Immigration Judge denied the respondent's applications for asylum and withholding of removal pursuant to sections 208(a) and 241 (b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3), respectively, and his request for relief under the Convention Against Torture. See 8 C.F.R. §§ 1208.16-.18 (2007). The respondent's appeal of that decision will be dismissed.

The respondent is a native and citizen of Indonesia who alleges past persecution and a well-founded fear of future persecution on account of his Chinese ethnicity and non-Muslim background. The respondent states on appeal that he has witnessed the persecution of Chinese non-Muslims, while noting that the Indonesian government fails to afford adequate protection against such mistreatment, and contends that the Immigration Judge failed to cumulatively consider his case (Respondent's Notice of Appeal at 2). The respondent also argues that he faces an increased likelihood of suffering persecution as he now has a Chinese non-Muslim wife and child (Respondent's Notice of Appeal at 2).

We conclude that the respondent has not demonstrated eligibility for relief. See INS v. CardozaFonseca, 480 U.S. 421 (1987). We find that the Immigration Judge correctly held that the respondent failed to establish past persecution or an objectively reasonable well-founded fear of future persecution on account of any of the five enumerated grounds in the Act (I.J. at 7-9). First, although the respondent contends that he suffered past persecution while in Indonesia because of his

Chinese ethnicity and his non-Muslim, Buddhist faith (Exh. 2; Tr. at 15), we find that his prior mistreatment does not amount to persecution as contemplated by the Act (I.J. at 3-5, 7-8). See Matter of /O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998). The respondent does not meaningfully address the Immigration Judge's finding that he has not suffered any physical injury in Indonesia and that his prior experiences in this regard primarily consist of harassment, discrimination, and property damage to his car and home (I.J. at 3-4, 8; Tr. at 18-24). See generally Eduard v. Ashcroft, 379 F.3d 182, 188 (5th Cir. 2004) (persecution cannot be based on "mere denigration, harassment, and threats"); Korablina v. INS, 158 F.3d 1038, 1044 (9th Cir. 1998) (defining persecution as "an extreme concept that does not include every sort of treatment our society regards as offensive") (quoting Singh v. INS, 134 F3d 962, 967 (9th Cir. 1998)). Thus, in considering the cumulative effect of all the incidents described by the respondent, we find that he has not established past persecution.

We also find that the respondent failed to demonstrate a well-founded fear of future persecution (I.J. at 8-9). See Liti v. Gonzales, 411 F.3d 631, 636-637 (6th Cir. 2005). Specifically, the respondent did not present specific and individualized evidence establishing a reasonable possibility of suffering persecution upon his return to Indonesia. For example, in light of the country reports discussed by the Immigration Judge and the absence of evidence from the respondent refuting such information (I.J. at 5-6; Exh. 5), we see no clear error in the Immigration Judge's finding that "instances of discrimination and harassment of ethnic Chinese [individuals] declined compared with

previous years." See 8 C.F.R. § 1003.1(d)(3)(i). The Immigration Judge noted that although ethnic discrimination has not ceased - while specifically mentioning that Buddhism is officially recognized by the Indonesian government - the United States Department of State reported that there has been a reduction in religious tension and discrimination (I.J. at 5-6, 8-9; Exh. 5 at 13-14). Additionally, we find the fact that the respondent's parents are able to continue to live in Indonesia undermines the reasonableness of his fear (I.J. at 7, 9; Tr. at 26). See Matter of A-E-, 21 I&N Dec. 1157, 1160 (BIA 1998) (holding that the continued residence of an applicant's family in the country from which he or she seeks asylum reduces the reasonableness of his or her fear of persecution). Thus, we find that the respondent's fears are too speculative to give rise to a well-founded fear of persecution.

In sum, we find that the Immigration Judge's denial of asylum is correct as the respondent failed to meet his burden of proof for relief. Further, inasmuch as the respondent has failed to meet the burden necessary to establish eligibility for asylum, it follows that he has also failed to satisfy the higher standard required for withholding of removal (I.J. at 9). See Matter of R-S-H-, 23 I&N Dec. 629 (BIA 2003); see also Amir v. Gonzales, 467 F.3d 921, 926 (6th Cir. 2006) (upholding the Immigration Judge's conclusion "that regardless of credibility, Amir had failed to meet his burden in showing that there was a 'clear probability' that he would be subject to persecution on the basis of his religion if he was removed to Indonesia"). In addition, we agree with the Immigration Judge that the respondent failed to demonstrate a more likely than not probability of being tortured if removed to Indonesia and we will,

therefore, deny his application under the Convention Against Torture (I.J. at 10). See Matter of G-A-, 23 I&N Dec. 366 (BIA 2002). Consequently, notwithstanding any evidence regarding the respondent's family in the United States or their ethnic or religious background, he has not met his burden of proof for any form of relief (I.J. at 10). Thus, as the respondent raises no arguments on appeal which were not addressed by the Immigration Judge or which would cause us to reverse the Immigration Judge's decision, we find no grounds upon which to disturb the Immigration Judge's order. Accordingly, the respondent's appeal will be dismissed.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A 79 483 629 - Denver

Date: NOV 10 2004

In re: SUMARDI SUNARTO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

The respondent has appealed the Immigration Judge's decision rendered on March 13, 2003. A review of the record of proceedings reveals that the file has been reconstructed and does not contain the tapes of the testimony of the hearing or the Immigration Judge's oral decision. As we consider the transcript and Immigration Judge's decision necessary for our review of the matter, we will return the record to the Immigration Court for further action. Upon receipt of the record, the Immigration Court shall take such steps as are necessary and appropriate to ensure that a complete transcript of

the proceedings and a decision of the Immigration Judge are made a part of the record.

ORDER: The record is returned to the Immigration Court for further action as appropriate and certification to the Board by the Immigration Judge thereafter.

FOR THE BOARD

IMMIGRATION COURT
167 N. MAIN STREET, ROOM 460
MEMPHIS, TN 38103

In the matter of Case No.: A79-483-629

SUNARTO, SUMARDI
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IIMMIGRATION JUDGE

This is a summary of the oral decision entered on June 8, 2006.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[x] The respondent was ordered removed from the United States to Indonesia or in the alternative to

[ ] Respondent application for voluntary departure was denied and respondent was ordered removed to
Or in the alternative to

[ ] Respondent application for voluntary departure was granted until upon posting a bond in the amount of $ _____
with an alternate order of removal to

Respondent's application for:

[X] Asylum was ( ) granted (X) denied ( ) Withdrawn

[X] Witholding of removal was ( ) granted (X) denied ( ) withdrawn

APPENDIX F

[ ] A waiver under section __ was ( ) granted ( ) denied ( ) withdrawn

[x] Cancellation under section 240A (a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A (b) (1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under section 240A (b) (2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of status under section ____was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal ( ) deferral of removal under article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246

[ ] Respondent is admitted to the United States as _____ until _____

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration judge's oral decision.

[ ] Proceedings were terminated.
[ ] Other:

Date: June 8, 2006

CHARLES E. PAZAR

Immigration Judge

Appeal: Waived / Reserved (Circled) Appeal Due by: July 10/2006

ALIEN NUMBER: 79-483-629 ALIEN NAME: SUNARTO, SUMARDI

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P) TO: [P] ALIEN [ ] ALIEN c/o Custodial officer [ ] ALIEN'S ATT/REP [P] INS
DATE: 6/8/2006 BY COURT STAFF Charles Pazar

ATTACHMENTS: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Memphis, Tennessee

File A 79 483 629 June 8, 2006

In the Matter of

SUMARDI SUNARTO,
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a) (1) (B).

APPLICATIONS: Asylum; withholding of removal; Torture Convention relief.[1]

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS:
Harris Lee Leatherwood, Esquire

ORDER AND DECISION

Respondent is a married male, 36 years of age, native and citizen of Indonesia. Based upon admissions that were made before the Immigration

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[1]Respondent has indicated that he does not wish to be considered for voluntary departure.

Court in Denver, and based on the evidence of record, the court sustains the charge and finds respondent to be a non-immigrant who has remained in the United States for a time longer than permitted by his visa, in violation of Section 237(a) (1) (B) of the Act.

STATEMENT OF THE CASE

This case comes before the Immigration Court in Memphis upon change of venue from the Immigration Court in Denver, the Honorable J.P. Vandello, Immigration Judge. The Immigration Court in Denver, in turn, received this record from the Board of Immigration Appeals. At Exhibit 4, Judge Vandello notes that this is one of several Denver cases where the BIA has lost the file. We have no idea why or how this is happening. A de novo hearing is required. Therefore, the venue motion was granted.

Judge Pazar in Memphis conducted the hearing today in which respondent was the only witness. Voluminous documentation from the Board of Immigration Appeals is before the court in Memphis. That is to say, the record was reconstructed and certain documents have been added to the record by respondent.

Judge Pazar has denominated as Exhibit 3 a packet which includes respondent's statement and other documents relevant to his claim, numbered pages 1 through 69. Respondent has submitted Exhibit 9 which are more recent background materials concerning the situation in Indonesia as well as his personal statement. The Country Report for 2005 for Indonesia is found at Exhibit 5. Other

exhibits include background material at Exhibit 6, 7, 7A and the 8 and the application itself which is at Exhibit 2. Respondent is the only witness.

Respondent testified that he came to the United States in July 2000 and has not left the United States and this is the only time he has been to the United States. Respondent testified that he is a native and citizen of Indonesia who is of Chinese ancestry and practices Buddhism. The respondent graduated from a technical college which would be the equivalent of a four year degree in the United States. Respondent was in produce designing production and worked for a company that manufactured automobile radiators.

Respondent described four incidents in which he was almost injured but at no time has respondent offered testimony to show that he was injured by people he describes as native whom the court understands to be members of the majority ethnic group and majority religion in Indonesia.

In an incident in 1983, a group of ethnic Indonesians attached Chinese homes in Aceh where respondent and his family lived. The school that respondent attended was hit by rocks and the school was closed for about five days and respondent testified that his parents had to come and pick him up and he came to safety after his parents paid the police to protect them.

The next problem was in May 1998 when he was driving home and apparently was on the on ramp to a toll way when he saw ahead of him a group of people attacking automobiles and he believed that there were ethnic Chinese passengers in those vehicles. Respondent saw men with machetes and axes and that one of these groups was beating some Chinese passengers in vehicles and so when

respondent heard this group saying to kill the Chinese, kill them, kill them, he turned around, went back down the on ramp and his car was pelted with rocks and the back window was broken. He returned to the home that he lived in. By that time he had moved out of his parents' house and while some rocks were thrown/his house was damaged but not destroyed and he had to wait for a period of time at his workplace before going back home.

In November 1999 in Karawan, West Java, where respondent was working, another incident arose where traffic police were checking on motorcycle taxis and people who operated those taxis took out their frustrations at law enforcement and the local Chinese population. Respondent testified that he was followed on foot by a group of Muslims and escaped by running into a nearby house that was a Chinese house but at that time was unoccupied. He waited a day, went home and found that his own house was not particularly heavily damaged.

While respondent testified that he suffered no physical injuries, he testified that he was traumatized as a result of these incidents. However, respondent presents no documentation from a psychiatrist or a psychologist showing that he was under care for such trauma and he has not sought such care and apparently is not taking any medication.

Respondent testified that he did not report any of these incidents to the police because there really was no use, that the police would just protect their own people.

Respondent described himself as Buddhist, his mother being Roman Catholic and his father Buddhist. His parents remain in Aceh. His father is about 70 years of age or maybe older and he was 70

when he retired from operating a restaurant and coffee shop which respondent testified his father had to sell because native Indonesians would come in and take a meal without paying.

Nonetheless his parents appear to the court to be very comfortably off and respondent himself testified that he went to a private technical school which his parents apparently paid for and so he has the benefit of higher education.

The respondent testified that in another incident in 1998 while driving, respondent came up to a traffic light and somebody, a beggar apparently at the side of the road asked for money and when respondent didn't give the money his car was scratched. In another incident respondent testified that he was required to provide proof of Indonesian citizenship when he was applying to college. In another incident he testified that his identification card shows that he is ethnically Chinese.

Among the myriad of documents in the record, the State Department Report at Exhibit 5 stands out for its recency and its clarity. The State Department notes that Indonesia is a multiparty democratic presidential republic with a varied ethnic background but a somewhat imperfect as all countries are human rights record. The State Department Reports that the religious situation in Indonesia has eased somewhat but that indeed the national identification card requires the holder to show that one of the five official religions including respondent's religion, Buddhism, be on the card, that is be shown on the card.

The State Department noted that government policies in Indonesia appear to discriminate against members of minority religions including religions not recognized by the government but Buddhism is

recognized by the government.
There were also incidents of societal discrimination including efforts to close unlicensed churches. Respondent testified that his mother was able to attend mass although she had to be careful and the court asked respondent testified we're all trying to be careful in our daily lives.

The State Department states that the Chinese population accounts for approximately three percent of the population which is by far the largest non-indigenous minority group and they play a major role in the economy. The State Department noted instances of discrimination and harassment of ethnic Chinese declined compared with previous years. Recent reforms stated the State Department increased religious and cultural freedoms. This is not to say that there is not discrimination against ethnic Chinese who are citizens of Indonesia but the State Department notes a reduction in tensions and discrimination and harassment.

In the more recent packet at Exhibit 9 that respondent has submitted shows that there have been bombings in Indonesia and that Christian school girls, and of course, respondent is not Christian, have suffered at the hands of certain benighted people.

Respondent presents no corroboration of any of his claims. Respondent
has not shown that his parents have had any difficulties that would amount to persecution and the respondent has not corroborated in any meaningful way and aspect of the claim except to present numerous background material pages through newspaper articles and web-sites and the like concerning the situation in Indonesia.

FINDINGS OF FACT CONCLUSIONS OF LAW, AND STATEMENT OF RELEVANT LAW

Finding of Fact 1: The application is timely.

Finding of Fact 2: The court will credit respondent.

Credibility is a fact determination in this circuit.

Yu v. Ashcroft, 364 F.3d 700 (6th Cir. 2004). Respondent's testimony is generally consistent with the application and the court notes that the Government chose not to cross-examine respondent and so the court makes a favorable credible credibility determination in this case.

Conclusion of Law 1: Respondent did not suffer past persecution in Indonesia. Respondent must show past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Koliada v. INS, 259 F.3d 482, 487 (2001); INS v. Elias-zacarias, 502 U.S. 478 (1992). Respondent bases his claim on his ethnicity thus his membership in a particular social group and his religion.

Respondent testified that he was almost injured on several occasions and on another occasion had to stay in school for a while until rioting in the neighborhood subsided. He has failed to show that he has been persecuted on account of one of the five protected grounds. Mikhailevitch v. INS, 146 F.3d 384 (6th Cir. 1998). Indeed, the Mikhailevitch court makes clear that discrimination and harassment do not constitute persecution. The Immigration Judge finds that respondent may have been discriminated against in the past in Indonesia although his situation certainly is one of relative advantage compared to a very poor population elsewhere in Indonesia. Respondent had a responsible job and he

had graduated from technical school and while he complained about being forced to prove his citizenship he did graduate from that school. The other instances that respondent described do not rise to the level of persecution.

Conclusion of Law 2: Respondent has not shown a well- founded fear of persecution.

Objectively viewed, see, Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987), respondent has failed to show a well- founded fear of persecution. He has shown some incidents where he or other Indonesian people of Chinese descent or Buddhist belief may have been discriminated against and he has shown that other Chinese people may have been targeted for mob violence in
the past. However, the evidence particularly found at Exhibit 5 shows that the government is taking steps to reduce human rights abuses in Aceh province particularly and throughout Indonesia. See, Exhibit 5 page 1.

Respondent's parents remain safely in Indonesia and the court asked respondent if anything happened to them and he said no. Indeed, it appears that his father retired as one would expect a 70 year old man to do. Respondent did not testified that anything happened to his father as a result of his ethnicity or his religious belief.

In Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998), the Board held that remaining family members in an applicant's home country who have not suffered harm by fact of the family members not suffering harm goes far to diminish the well-foundedness viewed objectively of the respondent, the applicant's fear of persecution.

All this is not to say that there is not discrimination against ethnic Chinese in Indonesia.

It is to say that respondent has failed to demonstrate a well-founded fear of persecution on account of his ethnicity and his religion.

Conclusion of Law 3: Respondent is not eligible for either form of withholding.

In as much as respondent has failed to demonstrate a well-founded fear of persecution, of course, he has failed to demonstrate a clear probability of persecution and the court denies withholding of removal.

The court construes respondent's application as an application for Torture Convention relief. The evidence of record shows that respondent was never tortured by an agent of the Indonesian government. The evidence specially found at Exhibit 5 shows that the Indonesian government is attempting to improve its human rights record and even the mass of material that the respondent relies upon does not establish a clear probability of torture by agents of the Indonesian government. In accordance with Six Circuit case law the court makes a specific credibility finding and finds respondent to be credible as to his application for Torture Convention relief.

Respondent asked the court for relief because his wife is an ethnic Chinese and a native and citizen of Malaysia and they have United States citizen child. His wife's case is now before the Board of Immigration Appeals, this court having denied that application in the past. The court specifically finds that there is no basis for relief based upon this couple having a child. The Immigration Judge attempted to qualify this respondent for the privilege of voluntary departure but respondent was steadfast in saying that he did not want to voluntarily depart to go anywhere so the court did not pursue that line of

inquiry with the respondent.

Taking together, the court enters this order:

ORDER

Respondent's application for asylum, withholding of removal, and for Torture Convention relief are denied.

Respondent is ordered removed to Indonesia.

CHARLES E. PAZAR
Immigration Judge